Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

NO. _____

CYRUS J. CERRO,

Petitioner,

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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80 pp

PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.

Petitioner was interrogated without Miranda warning and counsel during custodial interrogation with FBI and U.S. Attorney. Petitioner was not advised by counsel of his Fifth Amendment rights and was misled by his counsel and government that Statute of Limitations was six years instead of five years. Petitioner's counsel did not advise him of the law and his rights regarding a plea agreement or defend him during the plea. Retained counsel did not defend petitioner in sentencing or the rule 35 post Conviction motion. Counsel was ineffective through out the case from the beginning through the perfunctory rule 35.

1. Whether the court of appeals rendered a decision in conflict with the decisions of this court in Miranda v. Arizona, 384 U.S. 436 (1966), Strickland v. Washington 466 U.S. 668 (1984) and Hill v. Lockhart, 474 U.S. 52 (1985) when it ruled that the prosecutor's misstatement of the law, custodial interrogation without counsel present and without reading the petitioner his rights was not a violation of the Fifth Amendment and the Sixth Amendment but harmless error.

2. Whether the court of appeals rendered a decision in conflict with this court in Weaver v. Graham, 450 U.S. 24 and the U.S. Constitution, Art. 1, Section 10, Cl. 1 in ruling that an application of ex post facto law was harmless error.

3. Whether the court of appeals rendered a decision in conflict with the decision of this court in Boykin v. Alabama, 395 U.S. 238 (1969) when it ruled that the defendant could only withdraw his guilty plea under a constitutional question.

4. Whether the court of appeals rendered a decision in conflict with the decision of this court in Toussie v. United States, 397 U.S. 112 (1970) and the specific intent of Congress when it upheld a waiver of the statute of limitations after they had expired and petitioner did not have effective assistance of counsel as defined in Strickland, Supra. and Hill, supra.

5. Whether the court of appeals rendered a decision in conflict with the decisions of this court in Strickland v. Washington, 466 U.S. 668 (1984), and Hill, Supra. and of other courts of appeal when it ruled that petitioner's counsel was not ineffective and denied his Sixth Amendment rights to effective counsel at all stages of the case and whether the court of appeals committed plain error when it rendered a decision in conflict with the decisions of this court in Hughey v.United States,110 S.Ct. 1979 (1990), other courts of appeal and the specific legislative intent of Congress when it ordered restitution not allowed by statute.

6. Whether the court of appeals rendered a decision in conflict with the decision of this court in Strickland v. Washington, 466 U.S. 668 1984), Hill, Supra and other courts of appeal including an en banc decision in the Ninth circuit under Cooper v. Fitzharris, 586 F.2d 1325 (9th cir.1978) cert denied 440 U.S. 974 (1979) when it only allowed two issues to be found on at the evidentiary hearing denying a hearing on the cumulative actions of retained counsel denying petitioner his Fifth and Sixth Amendment rights.

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DECISIONS BELOW

The Order of the United States Court of Appeals for the Ninth Circuit amending the unpublished MEMORANDUM decision on Petitioner's Motion For Rehearing and Suggestion For Hearing En Banc and a copy is attached hereto as Appendix (A.1). The decision of the United States Court of Appeals is an unpublished MEMORANDUM decision on Petitioner's appeal and a copy is attached hereto as Appendix (A.2). The Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge on Petitioner's 2255 motion is not reported and a copy is attached as Appendix (A.3). The Report and Recommendation of the United States Magistrate Judge to the District Court Judge on Petitioner's 2255 Motion is not reported and a copy is attached as Appendix (A.4).The Order of the District Court Denying In Part the 2255 Motion and Ordering an evidentiary hearing on selected issues is not reported and a copy is attached as Appendix (A.5). ORDER from Ninth Circuit charging Petitioner's retained counsel, Brooklier, of abandoning three clients on appeal which was ongoing during the pendency of instant matter, and is attached as Appendix (A.7).

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 10, 1998. Jurisdiction is conferred by 28 U.S.C. § 1254(1).

(ER is Appellant's Excerpts of Record, CR is the Court Record)

STATUTORY PROVISIONS INVOLVED

This case involves Amendment Five to the Constitution of the United States guaranteeing Due Process rights:

> "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, and the pursuit of happiness, without due process of law . . ."

Petitioner was denied Due Process when he was interrogated without a Miranda warning in a custodial interrogation with the FBI and U.S. Attorney in November, 1992 at the office of the U.S. Attorney in the Central District of California at Los Angeles, California where he was told the statute of limitations was six years and was requested to plead guilty to an information to be drawn later. The case also involves Amendment Six to the Constitution of the United States as follows:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of

the accusation, . . . and to have the assistance of counsel for his defense."

Petitioner did not have effective assistance of counsel during the investigative portion, the plea agreement, plea hearing, sentencing and post-sentencing Rule 35 Motion under Federal Rules of Criminal Procedure. The District Court violated Petitioner's Sixth Amendment rights when it failed to allow an evidentiary hearing to find on all counsel's conduct, allowing only two issues out of six grounds set forth in the 2255 Motion to be heard. Petitioner's counsel violated Petitioner's due process rights when he failed to advise him of his Fifth Amendment rights against self-incrimination rights during custodial interrogation . Counsel violated Petitioner's Sixth Amendment Rights when he failed to inform him regarding self-incrimination, failure to investigate the case at hand and agreeing with the prosecutor that the statute of limitations for 15 U.S.C. §§ 78(j)(b) and 78(ff), which have no provision for any statute of limitations, was six years instead of five years which misstated the limitation of actions to cover any conduct which was part of the basis for Petitioner's Plea Agreement. Counsel assured Petitioner that the most time he would serve was eighteen months, but the old law sentence would be 1/3 or six months and he would be paroled. Counsel, although receiving

the Pre-Sentence Report some 30 days prior to sentencing, did not show it to Petitioner until 10 minutes before sentencing. Petitioner told counsel the PSR was fraught with many errors but counsel told Petitioner to go along with it and not say anything as it might make the Judge mad. Counsel filed a perfunctory Rule 35, Fed.R.Cr.P. which had no factual basis for the court to act on and it was denied. The entire Rule 35 motion is set out in full text here:

"MEMORANDUM OF POINTS AND AUTHORITIES"

"Mr. Cerro was previously sentenced by this Court to an eight year term of imprisonment. This is an "old law" case and defendant will be eligible for parole at one-third of his sentence, i.e., 32 months. 18 U.S.C. 4205(a)(2).

As will be more fully developed at the time of this hearing, it is unlikely that Mr. Cerro will be given parole consideration until his maximum release date, i.e., 64 months. Mr. Cerro will have served approximately 3 times the amount of time he would have had normally received had he been sentenced pursuant to the guidelines.

A modification of sentence is authorized pursuant to former (Rule 35) of the Federal Rules of Criminal procedure." The motion alleged absolutely no set of facts upon which relief could be granted although counsel had such facts as was

determined by the evidentiary hearing of December 7, 1995. The District Court violated the Ninth Circuit law in sentencing Petitioner to restitution when it is not allowed by statute. It also is not in concert with other Circuits on the same subject. It also violates the decisions of this Court. District Judge Rafeedie sentenced Petitioner to Restitution under 18 U.S.C. § 3579. The Ninth Circuit Court effectively held on appeal that the Defendant falls under 18 U.S.C. 3663 and that he can be sentenced to restitution under 18 § 3663(a)(3) (1990). 18 U.S.C § 3663(a)(3) states:

"(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement." 18 U.S.C. § 3663(a)(3) (1990) is prefaced by § 3663(a)(1)(1990) states that:

"(a)(1) The court, when sentencing a defendant convicted under this title [Title 18] or for under subsection (h),(i),(j), or (n) of Section 902 of the Federal Aviation Act of 1958, may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of **such offense**, . . . " [Emphasis added]

The 1994 amendment to § 3663 offered more clarity on the Federal Aviation Act, supra, by substituting "section 46312,

46502, 46504 of Title 49 but did not change the wording on Title 18 offenses. The language is still clear. Title 18 Section 3663 only allows a court to order restitution under Title 18 and some Title 49 offenses to an amount agreed to in a plea agreement. Congress' legislative intent in this area is as follows for 18 U.S.C. § 3579 where it states;

"4. Provisions of the Bill.

Section (a) authorizes the court to order a defendant convicted of any offense **under Title 18 of the United States Code** other than those described in Section (d), ...

Section (d) specifically provides that restitution **may not be ordered** in cases arising under the antitrust laws, the securities laws, or certain other regulatory statutes. These statutes involve complex issues which are outside the intended scope of Section 3579. . . ."

[Emphasis added]

See S.Rep. No. 225, 98th Cong., 2d Sess. 122, *reprinted in* 1984 U.S. Code Cong. & Ad.News 8182, 3314.

STATEMENT OF THE CASE

In 1989, Petitioner was interviewed by FBI Case Agent Barbara Babcock. On or about November 12, 1992, Petitioner met with

AUSA Jean Kawahara and FBI Case Agent Babcock which was a custodial interrogation. On December 27, 1992, Petitioner executed a "Statute of Limitations Partial Waiver Agreement" for the periods 12/23/92-01/04/93. (E.R. 002-003). On January 6, 1993, Petitioner executed an additional "Statute of Limitations Partial Waiver Agreement" for the period of 01/04/93-01/15/93 (E.R 004-005. On 01/19/93, Petitioner executed the third and final "Statute of Limitations Partial Waiver Agreement" commencing 01/15/93 and ending on 01/22/93 being withdrawn on January 22, 1993 if not accepted and signed. (E.R. 006-007) On March 11, 1993, Counsel Brooklier signed Petitioner's Plea Agreement of January 22, 1993. On April 5, 1993, Defendant entered into a Plea Agreement with the Government, wherein he would enter a guilty plea to an "Information" alleging "Three pre November 1, 1987 counts of securities fraud in violation of 15 U.S.C. §§ 78 j (b) and 78 ff and (17 C.F.R § 240.10b-5.) (C.R. 9). On or about June 1, 1993, petitioner's counsel received Petitioner's Pre-Sentence Report (PSR) from the U.S. Probation Office. About 10 minutes prior to Petitioner's sentencing hearing on July 9, 1993, counsel showed him the PSR for the first time. Later, Petitioner was sentenced to a term of eight years of imprisonment; 4 years confinement on Count 1 and 4 years on

Count 2, confinement on Count 2 running consecutive to Count 1; plus 5 years of probation to be consecutive to the period of confinement and to any parole term. No fine was imposed. In addition to confinement, Petitioner was directed to pay restitution in the amount of $892,000 (C.R 15). On July 29, 1993, Petitioner self-surrendered to the U.S. Marshal's office in Los Angeles, California at 12:00 noon. On November 5, 1993, Petitioner's counsel filed a Rule 35 Motion for Reduction of Sentence requesting a hearing for December 13, 1993. On December 7, 1993, the Government filed Memorandum in Opposition to Defendant's Motion for Reduction of Sentence. On December 9, 1993, District Judge Edward Rafeedie notified all parties that the Rule 35 Motion hearing on December 13, 1993 was taken off the calendar for decision without oral argument. On December 13, 1993, Judge Rafeedie denied the Rule 35 motion. (C.R. 24) On March 15, 1995, Petitioner's retained counsel, Dennis Owens, filed a Motion To Vacate, Set Aside, or Correct Sentence and Memorandum in Support of Motion to Vacate pursuant to 28 § 2255. On March 21, 1995, the court issued an Order for the Government to file a response to the 2255 motion. On June 2, 1995, the Government filed an Opposition to the 2255 motion. On June 16, 1995, the Government filed a supplemental declaration in Opposition to

the 2255 motion. On June 28, 1995, Petitioner filed a Reply Brief to the Government's Opposition to his 2255 motion.

On August 15, 1995, Judge Rafeedie issued an Order Denying in Part the Motion under 28 § 2255 while simultaneously issuing an Order referring two issues for an evidentiary hearing. (C.R. 35, E.R. 181-185). On December 7, 1995, an evidentiary hearing was held by U.S. Magistrate Judge Robert N. Block who took the issues raised under submission. On December 19, 1995, Judge Rafeedie filed an Order expanding the scope of issues set forth in his Order of August 15, 1995, supra. On December 20, 1995 Magistrate Block filed an Order regarding further Proceedings. During the period from December 20, 1995 and August 30, 1996 the issue of restitution was addressed by filings and telephonic status conferences. On September 23, 1996, Petitioner filed a Response to the Magistrate's Judge's Report and Recommendation. On December 23, 1996, Judge Rafeedie filed an Order accepting the Report and Recommendation without any changes. Petitioner is currently on parole under the supervision of the U.S. Probation and Parole Office in Fresno, California.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

1. Whether the court of appeals rendered a decision in conflict with the decisions in *Miranda v. Arizona*, 384 U.S. 436 (1966), Strickland v. Washington, 466 U.S. 668 (1984) and Hill v. Lockhart, 474 U.S. 52 (1985) when it ruled that the prosecutor's misstatement of the law, custodial interrogation without counsel present and without reading petitioner his rights was not a violation of the Fifth Amendment and the Sixth Amendment but harmless error.

A. INEFFECTIVE ASSISTANCE OF COUNSEL

1. Pre Plea Agreement Proceedings.

Petitioner was questioned on November 12, 1992, in a custodial interrogation by the Assistant U.S. Attorney and the FBI Case Agent on the matter at bar. He was never given his rights or told he could ask for counsel and he had never had any experience with the criminal justice system. He was asked to plead guilty to an "Information". When he retained counsel and related to him the meeting of November 12, 1992, counsel told him, "No more meetings unless I am present." Nothing was ever said to the Petitioner about his Due Process rights under the Fifth Amendment or brought up in court by counsel. Counsel further advised him to sign a waiver of the statute of limitations which had expired some 6 months earlier.

The last waiver signed by Petitioner expired prior to counsel and Petitioner signing it. The representation of petitioner by counsel at this point fell below reasonable standards. The Sixth Amendment right to counsel guarantees a criminal defendant the right to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970). Additionally, the United States Supreme Court has established a two prong test to determine if a defendant received effective assistance of counsel as guaranteed by the Sixth Amendment: (1) Counsel's assistance must have been "reasonably effective" and not fall below an "objective standard of reasonableness;" and (2) defendant must show that counsel's ineffective assistance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Supreme Court formulated a merger of the two tests in *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 303 (1985). The defendant must also meet the prejudice prong of *Strickland* by demonstrating there is a reasonable probability that, but for counsel's errors, he would not have plead guilty and would have insisted on going to trial. *Hill v. Lockhart*, supra at 59. Counsel's omissions, errors and lack of investigation for the law denied Petitioner effective assistance of counsel. Reasonable counsel would have

informed Petitioner of the meaning of the Statute of Limitations and that the Statute of Limitations would have been a valid affirmative defense at trial. Had counsel been an advocate for him and explained the possibilities of each event he would have rejected the Plea Agreement and let the Government go to the Grand Jury if they so chose. Failure to challenge the jurisdiction of the court at the Plea Hearing exposed Petitioner to unnecessary, unwarranted prosecution and subjected him to his loss of liberty. Petitioner was denied effective assistance of counsel at this part of the criminal process.

2. Whether the court of appeals rendered a decision in conflict with this court in Weaver v. Graham, 450 U.S. 24 and the U.S. Constitution Art. 1, Section 10, Cl.1 in ruling that an application of the ex post facto law was harmless error.

2. Plea Agreement Proceedings

a) Plea Agreement

Defendant was imprisoned in violation of the Constitution which was never mentioned or caught by counsel as no investigation was ever performed. The sentencing court's reliance on the 1988 amendment to the penalty section of 15 U.S.C. § 78 ff constituted an application of

ex post facto law. U.S. Constitution, Art. I., Section 10, Cl.I. "So much importance did the convention attach to [the ex post facto prohibition] that it is found twice in the Constitution." *Weaver v. Graham*, 450 U.S. 24, 28, n.8 (1981) (citing King v. Missouri, 107 U.S. 221, 227 (1883). In this case, at the plea hearing, the court applied the 1988 amendment to Title 15, supra, retroactively, in violation of the ex post facto clause. The court relied on the AUSA's assertion that the penalty for the Petitioner's 1987 acts was 10 years per count, on 2 occasions. The first misrepresentation by the U.S. Attorney occurred in the body of the plea agreement:

> "[t]he maximum sentence which the court can impose based upon your guilty plea is 30 years incarceration, a fine of $750,000 and a special assessment of $150 pursuant to 18 U.S.C. § 3013. (CR 11).

The AUSA again misstated the law at the plea hearing when the court asked the AUSA:

> The Court: "That's ten years for each offense, for each count; is that correct?" (CR9, RT-027)
>
> Ms. Kawahara: "Yes, your Honor." (CR9, RT-027)
>
> The Court: "$250,000 for each count. So what I have stated is the aggregate maximum sentence that may be imposed." (CR9, RT-027)

This factual inaccuracy was never controverted by counsel Brooklier at any time. Counsel Marks, Brooklier's partner, stood in for counsel Brooklier at the plea hearing and he never controverted the factual inaccuracy that such punishment did not become effective until November 1988. Mr. Marks has an excuse that he knew nothing about the case and was pressed into service that day due to Mr. Brooklier having to appear before the Ninth Circuit court for possible disbarment on three cases of client abandonment. See Appendix A.7. This was brought before the district court and ignored. The AUSA filed a Motion to Strike after the initial appeal briefs had been submitted to strike documents showing ineffectiveness of counsel that had been requested by the Magistrate Judge for the evidentiary hearing and were referenced in the Government's reply brief. The Motion to Strike was granted at the same time Petitioner's appeal was denied. In light of the complete failure of either Petitioner's counsel or the AUSA to notify the court of the proper penalty range the court's error is understandable. Counsel Brooklier's assertion was that if Defendant did not agree to a plea agreement he faced a maximum punishment of 30 years at trial. At no time, prior to the signing of the Plea Agreement, Plea Hearing, through sentencing, and beyond the filing of the Rule 35 Motion, supra,

did counsel ever tell Petitioner that the maximum punishment he could face was any different than 30 years. As a matter of fact, Petitioner did not realize anything about the error in sentencing maximums until after the Rule 35 had been denied. His counsel told him nothing and he found this on his own after he was incarcerated. This error is merged with the errors in Subparagraph 1. above further show that counsel did not investigate nor provide any defense or advice to Petitioner. Petitioner thought he was facing 30 years of imprisonment when considering his plea without any defense from his counsel. Counsel never controverted anything the AUSA offered in prosecution. Petitioner has been denied ineffective assistance of counsel.

3. Whether the court of appeals rendered a decision in conflict with the decision of this court in *Boykin v. Alabama*, 395 U.S. 238 (1969) when it ruled that the defendant could only withdraw his guilty plea under a constitutional question.

b) Guilty Plea

The test for determining the validity of a guilty plea is whether the plea represents the voluntary and intelligent choice of the defendant. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Hill v. Lockhart*, supra at 52. When a

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defendant enters a guilty plea on advise of counsel, "The voluntariness of the plea depends upon whether counsel's advise was within the range of competence demanded of Attorneys in criminal cases." *Hill v. Lockhart, Id.* at 56. (Citing *McMann v. Richardson*, supra at 397 U.S. at 771) The Sixth Amendment right to counsel guarantees a criminal defendant the right to effective assistance of counsel. *McMann, Id.* at 771, n.14. This Court, in *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 1472, 25 L.Ed.2d 747 (1970) held (A guilty plea cannot be "induced by misrepresentation.") Petitioner would assume that absolutely no representation, other than appearances by counsel, would fall under this ruling. The misrepresentation of the law by not investigating or knowing the law constitutes the same error and prejudice as directly misrepresenting the law to a defendant.

4. Whether the court of appeals rendered a decision in conflict with the decision of this court in *Toussie v. United States*, 397 U.S. 112 (1970) and the specific intent of Congress when it upheld a waiver of the statute of limitations after they had expired and petitioner did not have effective assistance of counsel as defined in *Strickland, supra* and *Hill, supra.*

3. Sentencing

a) Term of Imprisonment

Counsel Brooklier received Petitioner's PSR on or about the first of June, 1993. He never showed the Report to the Petitioner until ten minutes before the Sentencing Hearing commenced. Petitioner told counsel the restitution was in error by a large amount and there were people on the list that had not invested in Palomar Partners and other errors. Counsel Brooklier told Petitioner not to say anything as it might get the Judge mad. The Judge probably would have been somewhat upset if counsel had challenged the restitution and found counsel had not prepared nor shown the PSR to the Petitioner until right before sentencing. It took the court nearly a year to determine the real amount of restitution and the real investors. The sentencing court in its Order denying in part Motion under 28 U.S.C. § 2255, supra, denied relief based on its reliance on the PSR. However, the PSR was incorrect as to the maximum punishment, therefore it can only be concluded that the court was under a misapprehension of the maximum punishment at sentencing. Counsel failed to advise Petitioner the proper range of punishment he was facing aside from the issue concerning the Statute of Limitations. The substantive offenses should not have been prosecuted in this case as they were not filed before the expiration of the Statute of Limitations

which was misstated, as six years--instead of five years, by the Prosecution and accepted by Petitioner's counsel affecting his willingness to plead guilty and sentencing. The Statute of Limitations in this matter began to run on June 5, 1987 and expired June 4, 1992. There is no reasonable basis of understanding to subject an accused to the exposure of confinement when it is barred by statute; to do so simply violates the Petitioner's liberty due process clause, supra. As a matter of policy Congress has declared that a Statute of Limitations should not be extended "[e]xcept as otherwise expressly provided by law." *Toussie v. United States*, 397 U.S. 112, 25 L.Ed.2d 156, 161, 90 S.Ct. 858. No legal provision exists extending the statute in the case at bar beyond June 4, 1992. The Ninth Circuit is the only circuit which allows a defendant to waive the Statute of Limitations. They must be waived in a timely manner and under statutory law, not 6 months after the fact and not allowed to continue after abandoning it in the plea agreement which states:

> "[I]f, after discussing this offer with your attorney, you and your attorney decide to accept this offer, please sign in the spaces provided below. **If you do not accept this offer by January 22, 1993, it is automatically withdrawn**." [Emphasis added]

Petitioner never signed a waiver of the Statute of Limitations on or after January 22, 1993, the offer was not extended to Petitioner again but counsel signed the Agreement in March, 1993, requesting Petitioner to sign it which he did on April 5, 1993, the very day of his plea hearing. Again, counsel did not object on the basis of the Statute of Limitations and the law, thereby, prejudicing Defendant in his process through the criminal justice system. The Statute of Limitations expired for the third time. The government filed the charging "Information" on March 8, 1993, some 5 years and 9 months subsequent to the last alleged offense, (Count 3 of the 3 Count Information). (CR 1). The Government as its own sovereign surrendered its rights to prosecute on June 4, 1992. Thus, the adversarial process protected by the Sixth Amendment, supra, requires that the accused have "Counsel acting in the role of an advocate." *Anders v. California*, 386 U.S. 738, 743, 87 S..Ct. 1396, 1399, L.Ed.2d 493 (1967). *See also Jones v. Barnes*, 463 U.S. 745, 758, 103 S.Ct. 3308, 3316, 77 L.Ed. 2d 987 (1983), (Brennan J. Dissenting) ("to satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court"); *Ferri v. Akerman*, 444 U.S. 193, 204, 100 S.Ct. 402, 409, 62 L.Ed. 2d 359 (1979) ("Indeed, an indispensable element of the effective performance of [defense

counsel's] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.") Counsel never opposed the Government in any situation but just accepted the Prosecutor's investigation and findings without doing his own investigation. Perhaps this was due to counsel's precarious position with his license with the Ninth Circuit which precluded him being an adversary in the matter at bar. See Appendix A.7 and A.8 The right to effective assistance of counsel is the right of the accused to require the prosecution's case to service the crucible of meaningful adversarial testing. "If the process loses its character as a Confrontation between adversaries, the Constitutional guarantee is violated. *United States v. Cronic*, 104 S.Ct. 2039, 2045, 466 U.S. 648, 80 L.Ed.2d 657. Specific errors and omissions may be the focus of a claim of ineffective assistance of counsel as well. *See Strickland*, at 466 U.S. 693-696, supra. This case is riddled by errors and omissions by counsel who was not effective at any stage of these proceedings.

5. Whether the court of appeals rendered a decision in conflict with the decisions of this court in *Strickland v. Washington*, 466 U.S. 668 (1984), and *Hill, supra.* and other courts of appeal when it ruled that Petitioner's counsel was not ineffective and denied his Sixth

Amendment rights to effective assistance of counsel at all stages of the case and whether the court of appeals committed plain error when it rendered a decision in conflict with decisions of this court in *Hughey v. United States*, 110 S.Ct. 1979 (1990), other courts of appeal and the specific legislative intent of Congress when it ordered restitution not allowed by statute.

b) Restitution

Petitioner received ineffective assistance of counsel at sentencing, as a result of the extensive failures of counsel at sentencing, Petitioner meets the second prong again of the *Strickland* test that he was prejudiced by his trial counsel's failures. The Sentencing Court sentenced Petitioner based upon an error riddled Presentence Report. *No* objections to the accuracy of the report was ever made by Petitioner's trial counsel. There is nothing in the record to indicate that the Court did not take the *entire* PSR into account during sentencing. To the contrary during the Plea Hearing the court stated:

> "There will be no trial and I will enter a judgment of guilty and sentence you on the basis of your own guilty plea after considering a Presentence Report." (CR9, RT 025)

At the sentencing hearing on July 8, 1993, the court stated:

"the court has received and read and considered the Report of the probation officer." (RT041).

The court's reliance on the inaccurate PSR certainly prejudiced Petitioner at sentencing. (1) Trial counsel failed to discuss PSR until the very day of sentencing. (2) He failed to have a complete understanding of the errors in the PSR prior to sentencing. (3) Counsel failed to object to the evidence (errors in the PSR before the Sentencing Judge). It was his job to do so. (4) Counsel failed to produce any mitigating evidence to the PSR at sentencing. He failed in protecting the due process rights of the Petitioner as a result. (5) Counsel failed to inform the Judge of the appropriate punishment range as it related to: (A) the maximum period of confinement authorized by statute; that being 5 years per count and not 10 years per count; (B) the Maximum Fine authorized by statute which was $10,000 per count, not $250,000 per count or $750,000 as stated by the sentencing judge. (This error was also in the PSR). (ER 037); (C) No restitution was authorized by statute even though the PSR stated that restitution was authorized under 18 U.S.C. § 3579; (D) The sentencing court was restituting amounts in excess of the total alleged conduct and to persons who were not victims

in the case; (6) Counsel failed to do any investigation which would have exposed errors in the PSR.

(7) It is clear from the record below that counsel never filed any objections to the PSR (Perhaps bringing these errors to the Court's attention would be a conflict with his personal problems which he was facing during the pendency of this matter and possibly truly expose his full conduct as an ineffective counsel). See Appendix A.7 and A.8. (8) At the sentencing hearing, counsel produced no mitigating evidence. (9) At sentencing, counsel's closing argument made an inapplicable comparison of defendant's pre guidelines charges to guideline punishment. This was an issue already adversely ruled on by the Ninth Circuit as an irrelevant comparison. *United States v. Rewald,* 835 F.2d 215, 216 (9th Cir.1987). Counsel's entire defense was contrary to the explicit holdings of the Ninth Circuit in 1987 and still standing. This error cannot be attributed to a tactical decision of effective counsel, and in and of itself, it was ineffective assistance of counsel because counsel did not know the law. (10) Counsel failed to prepare adequately for sentencing. (11) Counsel failed to consult with Petitioner concerning inaccuracies in the PSR (other than those mentioned above) on the very day of sentencing. The Petitioner's claims of PSR inaccuracies were never limited to

restitution amounts. He complained vehemently that the PSR was riddled with clear misstatements of fact. The 22 page letter sent to counsel was not limited to a restitution argument but went back to the custodial interrogation of November 12, 1992 and Limitation of Actions and requesting to withdraw his plea. (12) Counsel failed to raise or preserve merits issue for appeal. (13) At sentencing counsel simply abandoned Petitioner which he apparently had done before to clients See Appendix A.7 and A.8. The Ninth Circuit in denying Petitioner's appeal on the issue of restitution used *United States v. Soderling*, 970 F.2d 529 (9th Cir.1992) to justify its position using statutory law to uphold their decision. The court ruled that 18 U.S.C. 3663 (a)(3), supra, should be the deciding factor that granted the court the power to deny Petitioner's issue to remove restitution as it is not allowed by law. This finding fails under statutory construction, as the clear and unambiguous part of § 3663 subparagraph (a)(1) limits restitution to offenses under Title 18 and Title 49. Petitioner in his appeal used a Ninth Circuit ruling in a case that had a plea agreement and a non-Title 18 or 49 offense. The matter was remanded to the District Court. The case used by Petitioner was *United States v. Snider*, 957 F.2d 703, 707 (9th Cir.1992) (Even if plea agreement could be read as specific agreement by defendant to make restitution in

the amount ordered, such agreement, standing alone, could not confer upon the court the power to require restitution). In this matter, the sentence was vacated and remanded with instructions there was not to be any restitution order in the new sentence as there was no Title 18 or Title 49 offenses involved. The *Snider* ruling is in concert with other circuits. *See United States v. Abod*, 770 F.2d 1293 (5th Cir.1985) (Court of Appeals vacated the restitution order recognizing that *Abod* had been convicted of a Title 15 offense. *See also United States v. Aguirre*, 926 F.2d 409 (5th Cir.1991) (court accepted government's confession of error for requesting restitution under a Title 12 offense). *United States v. Joseph*, 914 F.2d 780, 784-84 (6th Cir. 1990) *See Appendix A.6 which is a pamphlet issued by the United States Attorney's Office to Federal Inmates on arrival.* This Court in *Hughey v. United States*, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990) held that a district court was without power to order restitution even assuming the parties agreed to it. There is nothing in *Hughey* to suggest that the parties may "waive the statute" and agree to amounts over and above the authorized by statute. The Ninth Circuit followed *Hughey* in *Snider, supra,* (Following Hughey, we reach our conclusion as a matter of statutory construction). There is no statutory authority to order restitution in the case at bar. Had

counsel been effective there would have been no restitution in the plea agreement or sentencing.

6. Whether the court of appeals rendered a decision in conflict with the decision of this court in *Strickland v. Washington*, 466 U.S. 668 (1984), *Hill, supra* and other courts of appeal including an *en banc* decision in the Ninth circuit under *Cooper v. Fitzharris*, 586 F.2d 1325 (9th cir. 1978) *cert denied* 440 U.S. 974 (1979) when it only allowed two issues to be found on at the evidentiary hearing denying a hearing on the cumulative actions of retained counsel, thereby, denying petitioner his Fifth and Sixth Amendment rights.

4. Rule 35 Motion

After months of pleading with counsel that he focus his attention on Petitioner's Rule 35 Motion; after numerous letters from Petitioner to counsel (ER 047-048), (ER 049); after forwarding 22 typed pages of corrections to Petitioner's PSR (ER052-096); counsel filed an absolutely perfunctory Rule 35 as set forth in full text, supra. This motion was one step shy of filing no document at all which was in keeping with counsel's performance during the matter at bar. Counsel did not use the corrections given to him regarding the PSR by Petitioner and gave no reason for his failure. Had

counsel filed a Rule 35 based on the facts provided by Petitioner, counsel's ineffectiveness would have been bared and he was already facing disciplinary action at the time. See Appendix A.7. The motion was denied without a hearing as there were no facts for the court to use in ruling in favor of the Petitioner. Another example of counsel's ineffectiveness.

1.. Ineffective assistance of counsel in General

Although each allegation of counsel's ineffectiveness is examined individually, the cumulative impact of incidents is also to be considered. *Crisp v. Duckworth*, 743 F.2d 580, 583 (7th Cir.1984). The case at bar is on point with the case of *Iaea v.Sunn*, 800 F.2d 861, 864 (9th Cir. 1986) where counsel advised *Iaea* that he was subject to Hawaii's minimum sentencing law, that there was almost no chance of his receiving and extended or life sentence and that he had a chance to receive probation if he plead guilty. The court found *Iaea's* counsel's performance to be deficient. Sadly, Petitioner's retained counsel did not advise him during interrogation, and did not appear at the plea hearing to discharge his professional responsibilities. In his place at the plea hearing, appeared his partner Donald Marks. Counsel was preoccupied fighting pending charges at the Ninth Circuit for abandonment of three clients after accepting retainers. See Appendix A.7 and A.8.

The Ninth Circuit has previously recognized that "prejudice may result from the cumulative impact of multiple deficiencies." *Cooper v. Fitzharris*, 586 F.2d 1325, 1333, (9th Cir.1978)(en banc, cert. denied 440 U.S. 974 (1979). In *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir.1992), cert denied, 113 S.Ct. 1363 (1993), cumulative errors included counsel's failure to present mitigating evidence in the penalty phase. In *Harris v. Wood*, 64 F.3d 431, 1433 (9th Cir.1995) the defendant suffered a number of errors by counsel that far exceeded the number that effected the defense in *Mak*, supra. We do not hesitate to conclude that there is a reasonable probability that, absent the deficiencies, the outcome of the trial might well have been different. *See Strickland*, supra at 466 U.S. at 695. Indeed the plethora and gravity of Anderson's deficiencies rendered the proceeding fundamentally unfair. *Harris, supra. See Id.* at 696. ("Ultimate focus of inquiry must be on fundamental fairness of the proceeding whose result is being challenged"). The district court did not allow a full review of the proceedings in the matter at bar denying Petitioner due process under the Fifth Amendment. By finding cumulative prejudice, we obviate the need to a analyze the individual prejudicial effect of each deficiency. *Harris, supra. See Mak, supra* at 622 ("We do not need to decide whether these deficiencies alone met the

prejudice standard because other significant errors occurred that considered cumulatively, compel affirmance . . .")

Although Petitioner recognizes the Ninth Circuit has found errors very infrequently in the Post-Strickland era, the case at bar begs for immediate inclusion to that very select list. Counsel Brooklier's performance was deficient in at least 13 ways several of them undisputed as confirmed by Magistrate Judge, Robert N. Block in his Report and Recommendation, supra. Petitioner prays that this Court, after carefully analyzing all of the Sixth Amendment deficiencies of counsel, individually and cumulatively, will confirm that counsel was ineffective throughout all phases of these proceedings, and, thereby, grant Petitioner relief by setting aside his sentence, vacating his judgment of conviction and Grant his Writ of Certiorari.

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CONCLUSION

Certiorari should be granted because the District Court and the Appeals Court, in addition to violating Petitioner's Fifth and Sixth Amendment rights, have made decisions in direct conflict with this Court, other circuits and their own circuit law. They are directly opposed with this Court and all other circuit courts in the right to waive the Statue of Limitations even if it has expired. Counsel's performance has met both the prongs of *Strickland* (low defense standards and prejudice) which have violated Petitioner's Sixth Amendment rights. The court below is in direct conflict with this Court and other circuits on statutory construction of the restitution statute, 18 U.S.C. § 3579 and 18 U.S.C. § 3663. Petitioner respectfully requests this Court to follow their ruling in *Haines v.Kerner* 404 U.S. 519, 92 S.Ct. 94 (1972) where the Court stated, "Pro Se pleadings are to be held to less stringent standards than formal pleadings drafted by lawyers." The Judgment below should be reversed and Petitioner's guilty plea be vacated.

Respectfully submitted,

CYRUS J. CERRO
424 West 1st Street, #1
Tustin, CA 92780
(714) 544-0544
Petitioner In Pro Se

Appendix A.1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

4/10/98

UNITED STATES OF AMERICA,	No. 97-55127
Plaintiff-Appellee,	DC Nos. CV-95-01623-ER CR-93-00202-ER
v.	Central California (Los Angeles)
CYRUS CERRO,	
Defendant-Appellant.	ORDER

Before: BROWNING, KLEINFELD, and THOMAS, Circuit Judges.

The memorandum disposition filed January 12, 1998 is amended as follows:

At page 3, line 4, the sentence which begins "Furthermore" as amended to read: "Furthermore, restitution was properly imposed on all three counts pursuant to the amended version of the Victim and Witness Protection Act (codified at 18 U.S.C. § 3663 (a)) in effect when the plea agreement was executed on April 5, 1993. See 18 U.S.C. § 3663 (a) (3) (1990) (allowing restitution to be ordered for "offenses under any title of the United States Code" and permitting courts to "order restitution in any criminal case to the extent agreed to . . . in a plea agreement"); see also United States v. Soderling, 970 F.2d 529, 534 n.9 (citations omitted) (recognizing that the 1990 amendment to the VWPA, codified at 18

U.S.C. § 3663 (a), may validate plea agreements "relating to offenses occurring before November 29, 1990, so long as the plea agreement was entered after November 29, 1990").

With the foregoing amendment, the panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc See Fed. R. App. P. 35.

Accordingly, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appendix A.2

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

1/20/98

FOR THE NINTH CIRCUIT

Clerk

UNITED STATES OF AMERICA,	No. 97-55127
Plaintiff-Appellee,	DC Nos. CV-95-01623-ER CR-93-00202-ER
v.	
CYRUS CERRO,	MEMORANDUM*
Defendant-Appellant	

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Submitted January 12, 1998**

Before: BROWNING, KLEINFELD, AND THOMAS, Circuit Judges.

Cyrus J. Cerro, a former federal prisoner, appeals pro se the district court's order granting in part and denying in part his 28 U.S.C. § 2255 motion. We review de nova, see United States v. Beirle, 77 F.3d 1199, 1200 (9th Cir. 1996), and affirm.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4. The government's motion to strike pages 8-19, 47-52 and 137-80 of Cerro's excerpts of record is granted. See Fed. R. App. P. 10(a).

I. Ex Post Facto Clause

Cerro contends that the district court erroneously sentenced him under the 1988 amendment of 15 U.S.C. § 78ff in violation of the Ex Post Facto Clause after the government overstated the maximum penalty in reliance on the amendment. We agree with the district court that Cerro was properly sentenced under the statue in effect at the time the offenses were committed. 1/

II. Ineffective Assistance of Counsel

Cerro contends that counsel was ineffective at sentencing for failing to inform him that the counts of conviction were barred by the statute of limitations. This contention lacks merit because Cerro expressly waived the statute of limitations so he could plead to pre-Guideline counts and avoid a mandatory sentencing range. See United States v. Littlefield, 105 F.3d 527, 528, (9th Cir.), cert denied, 117 S. Ct. 2423 (1997) (per curium) (recognizing that statute of limitations is a non-jurisdictional defense subject to waiver); see also Strickland v. Washington, 466 U.S. 668, 697 (1984). (ineffective assistance of counsel claims may be disposed of solely for lack of prejudice).

1./ We also agree that the government's overstatement of the maximum penalty did not render Cerro's\ plea involuntary or not knowing and intelligent. See United States v. Sanclemente-Bejarno, 861 F.2d 206, 210 (9th Cir. 1991) (per curium) (holding failure to properly advise defendant of maximum penalty harmless where "the defendant knew before pleading that he could be sentenced to a term as long as the one he actually received").

Cerro also contends that counsel was ineffective for failing to (1) discuss the presentence report with him prior to sentencing; (2) object to a victim loss calculation in the presentence report; (3) challenge the court's restitution order as illegal order under 18 U.S.C. § 3579; and that counsel's numerous mistakes constitute cumulative error. We disagree. The record indicates that counsel and Cerro did discuss the presentence report prior to sentencing, and the counsel's decision not to object to the loss calculation was a reasonable tactical judgment. See Strickland, 466 U.S. at 689. Furthermore, the restitution order was proper as a condition of the five-year term of probation imposed on Count 3. See 18 U.S.C § 3651 (repealed 1987); Strickland, 466 U.S. at 697. finally Cerro fails to demonstrate that he suffered any prejudice not remedied by the amended restitution order.. See id. at 697. 2/

2./ Cerro also contends for the first time on appeal that sentencing counsel was ineffective for failing to inform him of his right to appeal. Cerro's habeas counsel did not raise this issue in his section 2255 petition. Because none of the exceptions apply here to overcome the general rule that issues raised for the first time on appeal are considered waived, we do not consider it. See United States v. Reyes-Alvarado, 963 F.2d 1184, 1189 (9th Cir.1992) (ineffective assistance of counsel first raised on appeal deemed waived where denial of review will not result of a miscarriage of justice, the issue does not arise during the pendency of appeal due to a change in the law, and the issue is not one purely of law).

We do not consider Cerro's claim that he was induced to plead guilty by his counsel's overstatement of the maximum penalty because he withdrew this claim prior to the district court's ruling. See Beierle, 77 F.3d at 1201.

Cerrro also contends that he is entitled to collateral relief beyond the district court's order reducing the amount of restitution owed because he was found ineligible for parole as a result of sentencing counsel's failure to object to the erroneous restitution order. Because Cerro is on parole, this claim is moot. See Fendler v. Bureau of Prisons, 846 F.2d 550, 555 (9th Cir.1987).

AFFIRMED.

Appendix A.3

UNITED STATES DISTRICT COURT FILED

10/31/96

CENTRAL DISTRICT OF CALIFORNIA

Clerk

UNITED STATES OF AMERICA, (RNB)	Case No. CV 95-1623-ER
Plaintiff,	ORDER ADOPTING
FINDINGS,	CONCLUSIONS AND
v.	RECOMMENDATIONS OF
	UNITED STATES
CYRUS CERRO,	MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has conducted a review of all the records and files of this case, including the Report and Recommendation of the United Magistrate Judge. A response to the Report and Recommendation by defendant, which the Court construes as objections, has also been filed herein. Having made a de nova determination of those portions of the Report and Recommendation to which objections have been made, the Court concurs with and adopts the findings and conclusions of the Magistrate Judge.

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IT IS ORDERED that the Judgment entered herein be amended as follows with respect to the restitution amounts ordered as to the following investors:

Name	Amount Ordered	Correct Amount
Farrington	$35,000	$25,000
Hull	$50,000	$25,000
Itkin	$35,000	$25,000
Zusman	$49,400	$25,000
Mackie	$27,000	$20,000
Malsi	$1,500	Zero
Phil-Mark Sales	$40,000	Zero

IT IS FURTHER ORDERED that the Clerk serve copies of this Order in this matter by United States mail on plaintiff and counsel for defendant.

Dated: October 31, 1996

EDWARD RAFEEDIE
U.S. DISTRICT JUDGE

Appendix A.4

UNITED STATES DISTRICT COURT FILED

CENTRAL DISTRICT OF CALIFORNIA 8/29/96

Clerk

UNITED STATES OF AMERICA, Plaintiff, vs. CYRUS CERRO, Defendant.	Case No.: CV 95-1623-ER (RNB) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Edward Rafeedie, United States Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

PROCEEDINGS

On August 15, 1995, the District Judge issued an Order herein denying Defendant's Motion to Vacate to Correct Sentence in its entirety, except as to the following grounds: (1) ineffective assistance of counsel related to counsel's allegedly incorrect advice, in connection with Defendant's guilty plea, relating to the maximum penalty Defendant faced; and (2) ineffective assistance of counsel in connection with the alleged failure to object at sentencing to an alleged factual inaccuracy related to the amount of loss incurred by investors Farrington, Fox, Hull, Itkin, Mackie, Malsi, Orange County Neonatology Group, Pacific Southwest

Mortgage Corp., Phil-mark Sales, Walsh and Zusman. In connection with these two issues, the District Court ordered that a magistrate judge be drawn to conduct an evidentiary hearing on whether Defendant received ineffective assistance of counsel, within the meaning on Strickland v Washington, 466 U.S. 668, 687-690 (1990).

Following the assignment of the matter to him, Magistrate Judge Block set a briefing schedule and set a date for the evidentiary hearing. Defendant filed his Trial Brief on October 3, 1995, and the Government filed its Supplemental Brief in Opposition on October 23, 1995. On November 29, 1995, after securing the District Judge's permission, the Magistrate Judge provided the parties with a copy of the confidential recommendation letter dated July 8, 1993, which accompanied the Presentence Report submitted to the District Judge prior to Defendant's sentencing.

The evidentiary hearing was held on December 7, 1995. At the outset of the evidentiary hearing, counsel for Defendant conceded that Defendant was unable to make the requisite showing of prejudice under Hill v. Lockhart 1/ with respect to Defendant's claim of ineffective assistance of

1 In Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), the Supreme court held that the two-part Strickland v. Washington test applies to challenges to guilty pleas based on ineffective assistance of counsel. 474 at 58. In the

context of a guilty plea challenge, the inquiry with respect to "prejudice" is "whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Id. In other words, in order to satisfy the prejudice requirement, the defendant must show there is a reasonable probability that, but for counsel's errors, he would not

counsel based on counsel's allegedly incorrect advice, in connection with the guilty plea, relating to the maximum penalty Defendant faced. Therefore, this claim was withdrawn.

Subsequent to the hearing, the Magistrate Judge advised the District Judge of a concern he had, based on the evidence presented at the hearing, about the methodology underlying the calculation of the restitution amounts recommended by the Probation Department, which the District Judge had then ordered.2/ The District Judge thereupon expanded the scope of the reference to encompass Defendant's claim that he received ineffective assistance of counsel in connection with counsel's failure to raise the issue of the alleged inaccurate restitution amounts in the Rule 35 motion.

_____1 (continued) have pleaded guilty and would have insisted on going to trial. See 474 U.S. at 58-59.

2 The Probation Officer who had recommended the restitution amounts in her confidential recommendation letter accompanying the Presentence Report testified at the evidentiary hearing that she had not independently verified with any of the investors the amounts she was recommending for restitution. Rather, these amounts came from information provided by the case officer, who had calculated the amounts by reviewing checks deposited into defendant's Palomar Partners checking account. The problem with this methodology is that defendant purportedly also deposited checks into that account which had no relation whatsoever to the Palomar Partners investment. The fact that two of the victims--Itkin and Hull--had sent letters to the Probation

Officer (which she forwarded to the District Judge under separate cover shortly before sentencing), which recited investment/loss amounts lower than the investment/loss amounts in the Presentence Report and lower than the recommended restitution amounts, should have been sufficient to alert the Probation Officer to a possible problem with the case officer's methodology.

Accordingly, on December 20, 1995, the Magistrate Judge issued an Order re Further Proceedings, wherein the Court inter alia ordered the Probation Department to contact each of the 11 investors as to whom Defendant was contending the restitution amounts were erroneous, for purposes of ascertaining whether in fact they had invested in Palomar Partners (an if so, the amount of their investment and how much they lost).

Pursuant to the Court's Order re Further Proceedings, on February 9, 1996, the Probation Department sent the Court a letter, reporting on the results of its follow-up investigation. According to the report, the restitution amounts ordered with respect to six of the eleven investors in question were incorrect. Since the Probation Officer apparently did not serve copies of this report on the parties, the Court directed the clerk to do so. There ensued a series of telephonic status conferences between Magistrate Judge Block and counsel, culminating in a complete agreement between the parties as to the correct restitution amounts for the 11 investors in question.

Thus, this matter is now ready for decision.

DISCUSSION

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court held that there are two components to an ineffective assistance of counsel claim:

"First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or sentence resulted from a breakdown in the adversary process that renders the result unreliable." 466 U.S. at 687.

The Supreme Court further held that there was no reason for a court deciding an ineffective assistance of counsel claim even to address both components of the inquiry if the defendant makes an insufficient showing on one. Id.

A. The alleged ineffective assistance in connection with the sentencing.

During the course of the evidentiary hearing, both sides stipulated that of the 11 investors as to whom Defendant disputed

the restitution amounts, only five were even mentioned in the Presentence Report. Of these five, Defendant did not dispute the accuracy as to two. Defendant did dispute the correctness of the restitution amounts ordered as to these two, since the amounts did not correspond to the investment/loss amounts recited in the Report. However, since the restitution amounts were not disclosed anywhere in the Report, but rather came from the confidential recommendation letter submitted to the District Judge by the Probation Department. Defendant is unable to contend that counsel's failure to object to the allegedly erroneous restitution amounts constituted ineffective assistance of counsel. Thus, Defendant's second ineffective assistance claim really devolves to counsel's failure to object to alleged factual inaccuracies in the Presentence Report with respect to three investors--Farrington, Hull, and Itkin. The total of these alleged factual inaccuracies amounted to $50,000.

Preliminarily, the Court notes that Defendant's claim that he lacked adequate time to review the Presentence Report is at least arguable belied by what occurred at the sentencing hearing. at the outset of the hearing, when the District Judge inquired of Mr. Brooklier whether he and his client had an opportunity to read the Presentence Report, Mr. Brooklier answered in the affirmative. When the Court then asked, "Is the Report factually accurate," Mr.

Brooklier again responded, "Yes, your honor." Defendant did not contradict this response. Moreover, Defendant made a lengthy allocution at the sentencing hearing, during which he neither refuted nor commented on Mr. Brooklier's representation that the Report was factually accurate. Cf. United States v. Maree, 934 F.2d 196, 200 (9th Cir.1991)(defendant's failure to disagree with counsel's statement at sentencing that he had reviewed the presentence report with his client supported a finding that the district court had adequately determined that defendant had an opportunity to review the report as required by Fed. R. Crim. P. 32 (a)(1)(A); United States v. Roberts, 5 F.3d 365, 372 (9th Cir.1993)(same).

In any event, the evidence presented at the hearing substantiates that Defendant's counsel, Mr. Brooklier, was aware of his client's belief that the Presentence Report erroneously stated the amounts invested/lost by these three investors. However, Mr. Brooklier made a tactical decision not to raise this issue at the sentencing hearing, because he regarded the total amount of these alleged errors (i.e., $50,000) as insignificant when viewed in context with the total investor losses in connection with this investment of more than $800,000. Based on his extensive federal criminal experience and in Mr./ Brooklier's\ best judgment at the time, the focus of his argument and Defendant's allocution at the

sentencing hearings should have been (and was) trying to convince the District Judge of defendant's remorse and why he should not be incarcerated for a significant period, as opposed to quibbling over $50.,000 loss figures recited in the Report.

Under the circumstances, the Court finds that Mr. Brooklier's failure to raise the issue of the $50,000 in alleged inaccuracies did not constitute conduct below the standard of reasonable competent representation. Having concluded that the Defendant has not met his burden with respect to the "deficient performance" prong of Strickland, it is not necessary for the Court to even reach the issue of whether Defendant has satisfied the "prejudice" prong. See Strickland, 466 U.S. at 697. 3/ (next page)

B. The alleged ineffective assistance in connection with the Rule 35 motion

It was uncontroverted at the evidentiary hearing that, subsequent to his sentence, Defendant provided Mr. Brooklier with 22 pages of objections to the Presentence Report. In addition, Defendant provided Mr. Brooklier with a schedule listing what he contended were the correct restitution amounts for the 11 investors as to whom the Defendant disputed the amount ordered. Defendant contended that some of the investors in fact had never invested in Palomar partners, and that the restitution amounts he

had been ordered to pay as to the others exceeded the amounts invested/loss. This information was provided to Mr. Brooklier prior to Mr.. Brooklier's filing of a Rule 35 motion on Defendant's behalf, yet Mr. Brooklier apparently failed to

3 As noted above, the restitution amounts were not recited anywhere in the presentence Report. Rather, it appears that those amounts were taken by the District Court. from the confidential recommendation letter dated July 8, 1993, which accompanied presentence report but was not disclosed to the parties. To the extent that the District Court did not rely on any of the alleged inaccuracies in the Presentence Report in sentencing the Defendant, neither Mr. Brooklier's failure to discuss the report with Defendant prior to the morning of the sentencing nor Mr. Brooklier's failure to object to the alleged inaccuracies in the Report could be deemed prejudicial. See Grady v. United States, 929 F.2d 468, 471 (9th Cir.1991) (the court rejected the petitioner's ineffective assistance claim, based on his failure to show prejudice from the allegedly inaccurate information in the presentence report.

investigate Defendant's contentions regarding the allegedly erroneous restitution amounts and failed to raise the issue in the Rule 35 motion.

The revised report submitted by the Probation Department in response to the Court's December 20, 1995 Order re Further Proceedings confirms the contentions made by Defendant to Mr. Brooklier regarding the correct restitution amounts which should have been ordered as to the following investors:4/

Name	Amount Ordered	Correct Amount
Farrington	$35,000	$25,000

Hull	$50,000	$25,000
Itkin	$35,000	$25,000
Zusman	$49,400	$25,000

Further, Defendant has now substantiated to the Government's satisfaction his contentions to Mr. Brooklier regarding the correct restitution amounts which should have been ordered as to the following other investors:

Name	Amount Ordered	Correct Amount
Malsi	$1,500	Zero
Phil-Mark Sales	$40,000	Zero5/

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4 In addition, the revised report indicated that the correct amount as to investor Mackie is $20,000, not the $27,000 ordered. The parties have stipulated to this amount.

5. The Government's agreement to this corrected amount is based on the fact that Phil-Mark apparently no longer exists.

The Court finds that Mr. Brooklier had no excuse for failing to raise the issue of allegedly erroneous restitution amounts in his Rule 35 motion, which for the forgoing investors totaled nearly $118,000. Thus, the Court finds that the Defendant has shown the requisite "deficient performance" as well as the requisite "prejudice," with respect to this issue.

RECOMMENDATION

for all of the foregoing reasons, it is recommended that the Court issue an order: (1) approving and adopting this Report and Recommendation; and (2) directing that the Judgment entered herein be amended as follows with respect to the restitution amounts ordered to the following investors:

Name	Amount Ordered	Correct Amount
Farrington	$35,000	$25,000
Hull	$50,000	$25,000
Itkin	$35,000	$25,000
Zusman	$49,400	$25,000
Mackie	$27,000	$20,000
Malsi	$1,500	Zero
Phil-Mark Sales	$40,000	Zero

Dated: August 28, 1996

ROBERT N. BLOCK
U.S. MAGISTRATE JUDGE

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FILED
FIRST CLASS MAIL POSTAGE PREPAID, TO ALL COUNSEL 8/15/95
(OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD
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Dated: 8/15/95

DEPUTY CLERK

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. CYRUS CERRO, Defendant.	No. CV 95-1623 ER ORDER DENYING IN PART MOTION UNDER 28 U.S.C. § 2255; ORDER REFERRING CERTAIN ISSUES TO MAGISTRATE JUDGE FOR EVIDENTIARY HEARING

The Court, having read and considered Defendant's Motion to Vacate, Set Aside, or Reduce Sentence, he opposing and reply papers thereto, and all other matters before the Court, HEREBY FINDS AND ORDERS as follows:

Defendant raises the following six bases for relief in his Motion: 1) he was sentenced pursuant to an ex post facto law; 2) his guilty plea was not knowing and voluntary because of ineffective assistance of counsel; 3) his guilty plea was involuntary because the prosecutor misstated the law; 4) he received ineffective assistance of counsel at sentencing; 5) he

received ineffective assistance of counsel in the filing of the Rule 35 1/ motion; and 6) he was not advised of his right to appeal.

The Court denies the Motion in its entirety, except as to the following grounds: 1) ineffective assistance of counsel related to counsel's allegedly incorrect advice, in connection with Defendant's guilty plea, relating t the maximum penalty Defendant faced; and 2) ineffective assistance of counsel in connection with the alleged failure to object at sentencing to an alleged factual inaccuracy related to the amount of loss incurred by investors Farrington, Fox, Hull, Itkin, Mackie, Malsi, Orange County Neonatology Group, Pacific Southwest Mortgage Corp., Phil-Mark Sales, Walsh and Zusman. The Court is unable to, based on the record, to determine whether the defendant's assertions are true, and therefore whether his attorney's performance was unreasonable. Accordingly, the Court finds these remaining claims require an evidentiary hearing under Rule 8(a) of the Rules Governing Section 2255 Proceedings.

28 U.S.C. § 636(b) authorizes a district judge to "designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition . . . of applications for post trial relief made by individuals convicted of criminal offenses . . ."

1/ Unless otherwise indicated, all references are to the Federal Rules of Criminal Procedure.

Therefore, IT IS HEREBY ORDERED that a magistrate judge be drawn to conduct an evidentiary hearing on the issues of whether Defendant received ineffective assistance of counsel, within the meaning of Strickland v. Washington, 466 U.S. 668, 687-90 (1984), in connection with the two issues reserved above.

With respect to the grounds upon which relief is DENIED, discussed more fully below, the Court notes that an evidentiary hearing is not required because there is no factual dispute for the Court to resolve. See Hill v. Lockhart, 474 U.S. 52 (1985).

1. Ex Post Facto Clause

Defendant was not sentenced in violation of the Ex Post Facto Clause of the Constitution. Notwithstanding the Plea Agreement's incorrect application of the maximum penalty, 2/ the Pre-Sentence Report contained the correct statement of the maximum penalty--that is, five years for per count. the Court relied on the correct maximum penalty in sentencing the Defendant. Accordingly, there was no violation of the Ex Post Facto Clause, and Defendant is entitled to no relief based thereon.

2/ The maximum penalty for the offenses to which Defendant pleaded guilty was increased from five years per count to ten years per count effective November 19, 1988. Defendant, however, pleaded guilty to offenses which occurred in May and June of 1987. Accordingly, the appropriate maximum penalty was five years per count; the Plea Agreement, however, incorrectly stated that "[t]he maximum sentence which the court can impose

is based upon your guilty pleas [to three counts] is 30 years incarceration . . ." which implies a ten year per count maximum.

2. Ineffective Assistance of Counsel in Connection with Guilty Plea

Defendant did not receive ineffective assistance of counsel in connection with his counsel's alleged failure to inform him that the statute of limitations had run for the offense to which he pleaded guilty. The Plea Agreement specifically states that Defendant "agree[d] to waive any defense based on the statute of limitations or pre-indictment delay as to the offense charged in the information." Defendant signed the Agreement having "read th[e] agreement and carefully reviewed every part of it with my attorney" and indicating that he understood it. Further, the Court specifically inquired about the statute of limitations waiver during the Rule 11 hearing, and the Defendant previously signed agreements tolling the statute of limitations. Accordingly, the Defendant has not demonstrated ineffective assistance of counsel within the meaning of Strickland, supra.

3. Prosecutor's Alleged Misstatement of the Maximum Penalty

The bare allegation that the prosecutor misstated the maximum penalty Defendant faced does not render Defendant's plea of involuntary or not knowing and intelligent. See United

States v. Sanclemente-Bejarano, 861 F.2d 206, 210 (9th Cir.1988). However, any misstatements can and should be considered in connection with the allegations relating to ineffective assistance of counsel based on a misunderstanding of the maximum penalty.

4. Ineffective Assistance of Counsel at Sentencing

Defendant has not shown ineffectiveness of counsel within the meaning of Strickland in connection with counsel's failure to advise the Court of the correct penalty. as previously discussed, the PSR reflected the correct maximum penalty and the Court sentenced Defendant considering the correct penalty. Hence, Defendant suffered no prejudice from the alleged error and he is entitled to no relief on this basis.

5. Ineffective Assistance of Counsel - Rule 35 motion

Defendant has not demonstrated that he received ineffective assistance of counsel within the meaning of Strickland in connection with the Rule 35 motion filed by his counsel. Defendant incorporated all grounds for relief that he claimed counsel should have raised in the Rule 35 motion in this Motion under § 2255; accordingly, since the Court is fully considering these issues, Defendant has suffered no prejudice.

6. Failure to Advise of Right to Appeal

Defendant is not entitled to relief based on the Court's failure to advise him of his right to appeal his sentence. The

version of Rule 32 (a)(2) applicable to Defendant's case states as follows: "[t]here shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendre." Amended Rule 32 (a)(2)--now Rule32(c)(5)--required notification of the right to appeal a sentence regardless of the plea. However, this amended Rule applied only to offenses committed on or after November 1, 1987;3/ hence, since Defendant pleaded guilty to offenses occurring in May and June of 1987, old Rule 32(a)(2), which did not require notification of the right to appeal, applies. Thus, this is not a valid basis for relief.

IT IS SO ORDERED

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: August 15, 1995

EDWARD RAFEEDIE
U.S. District Court Judge

3/ See Pub. L. No. 98-473, § 235, 1984 U.S.C.C.A.N., 98 Stat. 2014, 2031 (1987); Pub. L. No. 99-464 § 25, 100 Stat. 3597

Appendix A.6

U.S. Department of Justice
Washington, D.C. 20530

What You Need to

Know About Your

Criminal Debts

(SEAL)

DEPARTMENT OF JUSTICE

Prepared by:
Executive Office for
United States Attorneys

What You Need to Know
About

CRIMINAL DEBTS

This pamphlet contains information you should know about the payment of criminal fines or other monetary sanctions imposed upon you by a federal judge.

INMATE FINANCIAL
RESPONSIBILITY PROGRAM

If you have not already paid your criminal debts, you are urged to participate in the Inmate Financial Responsibility Program. Under that program, you and your case worker develop a financial plan. The plan should be designed to allow you to satisfy your court-imposed financial obligations. These include special penalty assessments, criminal files, restitution, court costs, other debts owed he United States, and other court-ordered obligations, such as child support, alimony, etc. This program will be explained to you in full by your case worker.

TYPES OF CRIMINAL DEBTS

There are several types of criminal monetary impositions, which are described below.

Special Assessments. Anyone convicted of offense against the United States is assessed. This assessment could range from $5 for an individual (in the case of an infraction) to $200 for an organization (in the case of a felony). The court must order the assessment for each count of conviction. All special assessments are deposited in the Crime Victims Fund.

If you have not already paid your special assessment as part of a plea agreement or at sentencing, you may work toward satisfying the assessment through the Inmate Financial Responsibility Program.

Criminal Fines, Interest, and Late Payment Penalties. The court may have imposed a fine upon your conviction of a criminal offense. The United States may enforce a fine under either (1) the Federal Debt Collection Procedures Act, (2) state law, or (3) any other federal law which provides for the collection of fines.

You also will be responsible for paying interest on the unpaid balance of your fine, unless interest was waived by the court in the judgment and commitment order. The amount depends on the statute under which you were sentenced. This, in turn, is determined by the date of the offense of conviction.

Please be aware that, unless otherwise ordered by the court, interest will accrue on the unpaid

balance of your fine during your period of incarceration.

Additional interest and late payment penalties also may accrue if your fine is not paid in a timely manner.

Restitution. Within the last decade, restitution to victims of crime has become a major objective of criminal monetary sanctions.

The Victim and Witness Protection Act provides for restitution when a defendant is convicted of an offense under title 18 or certain air piracy statutes. The victim may be the federal government or a third party.

When the court does not order restitution, it must state its reasons for not doing so. Courts have been known to order restitution on the basis that the victim should be compensated if any assets of the defendant are ever found, or if the defendant wins the lottery, inherits money, etc. By statute, the court must order that restitution be paid to the crime victims before the fine is paid.

A third-party victim may enforce an order of restitution in the manner of a civil judgment, or the government (acting on behalf of the victim) may enforce the order in the manner of a fine or a civil judgment.

Appearance Bond Forfeiture Judgments. Failure to appear in court as directed may result in forfeiture of collateral or an appearance bond. Enforcement of the forfeiture is obtained by moving the court for judgment under Federal Rule of Criminal Procedure 46. The judgment obtained is a civil judgment even though it arises from a criminal case.

Other Criminal Monetary Impositions. In general, a variety of statutes provide that the courts may order the defendant to reimburse funds from which he received support. These impositions, like appearance bond forfeiture judgments, arise from a criminal trial but are treated as civil judgments.

Costs of prosecution are the criminal equivalent of court costs in civil cases and may be awarded upon conviction of any non-capital offense obtained in district court. These costs are provided by statute and include fees of the clerk and marshal, fees

for printing and witnesses, compensation for experts, interpreters, etc.

Plea agreements also may provide for the payment by the defendant of the "cost of prosecution" where there are costs to the government of the investigation or other expenditures made by the government.

Reimbursements recovered for the costs of court-appointed counsel, medical and psychiatric treatment, or residence in a half-way house are returned to the appropriation of the agency operating the facility, as directed by the court order. These are considered civil judgments arising from a criminal case.

APPLICATION OF PAYMENTS

Payments received shall be applied in the following order: (1) to satisfy special assessments, (2) to restitution and (3) to fines. Payments applied to fines shall be applied as follows: (1) to the principal amount of the fine, (2) to costs, (3) to interest and (4) to penalties.

ENFORCEMENT OF PAYMENT

The United States may use the enforcement remedies provided by the Federal Debt Collection Procedures Act of 1992 or applicable state or federal law to enforce orders of fines or restitution.

By statute, the court considers the defendant's ability to pay a fine when it determines the amount of the fine at sentencing. By statute, a fine is due immediately unless the court, in the interest of justice, establishes an installment payment plan or orders payment by a certain date. 18 U.S.C. 3663.

Enforcement of a criminal fine is by execution against the property of the defendant. The United States Attorney's office is the district where the fine was imposed is responsible for enforcing the judgment. Liens are filed against the defendant's property, wherever located, to protect the interest of the government. Financial discovery under the Federal Rule of Civil Procedure is conducted to determine the debtor's assets. The government then levies execution upon the debtor's assets.

The Department of Justice routinely applies to the Internal Revenue Service for the offset of the defendant's Federal income tax refund against his federal criminal debts.

RESENTENCING FOR FAILURE TO PAY A FINE

If the defendant knowingly fails to pay a delinquent fine (i.e.; more than 30 days past due), the court may resentence the defendant to any sentence which might originally have been imposed. In these cases, the defendant may be sentenced to a new term of imprisonment only if the court determines that (1) he willfully refused to pay the delinquent fine, or (2) failed to make sufficient bona fide efforts to pay the fine, or (3) in light of the nature of the offense and his characteristics, alternatives to imprisonment are not adequate to serve the purpose of the deterrence. 18 U.S.C. 3614.

CRIMINAL DEFAULT

Whoever, having been sentenced to pay a fine, willfully fails to pay the fine, shall: (1) be fined not more than twice the amount of the unpaid balance of the fine or $10,000 whichever is greater; (2) imprisoned not more than one year; or (3) both. 18 U.S.C. 3615.

WHEN YOU ARE PLACED ON SUPERVISED RELEASE

If you are sentenced to supervised release after your release from incarceration, payment of any restitution remaining unpaid becomes a condition of supervised release by law. The court may order that payment of the remaining balance of your fine and other criminal debts be a condition of supervised release. The supervising probation officer must report the non-payment of a fine or restitution to the court. Willful non-payment may result in the court's revocation of your supervised release.

You also should be aware that the United States Code provides: "No prisoner shall be released on supervision unless such prisoner agrees to adhere to an installment schedule, not to exceed two years except in special circumstances, to pay for any fine imposed for the offense committed by such prisoner." 18 U.S.C. 3624(e).

EFFECT OF BANKRUPTCY

Fines and restitution are NOT dischargeable in bankruptcy. See 18 U.S.C. 3613; 11 U.S.C 1328(a) (effective November 28, 1990); Kelly v. Robinson, 479 U.S. 36(1986); United States v. Vetter, 895 F.2d 456 (8th Cir. 1990).

INELIGIBLE TO RECEIVE FEDERAL GRANTS OR LOANS

Federal law provides that any debtor who has a judgment lien against his or her property for a debt to the United States (this includes fines or restitution due to the United States) shall not be eligible to receive any grant or loan which is made, insured, guaranteed, or financed directly or indirectly be the United States or to receive funds directly from the Federal government in any program, except funds to which the debtor is entitled as a beneficiary, until the judgment is paid in full or otherwise satisfied. 28 U.S.C. 3202(e).

PRISONER TRANSFER REQUESTS

If you are a foreign national, you should know the if you request a transfer to the country of which you are a citizen, that transfer will be conditioned upon payment in full of your court-ordered financial obligations.

CRIME VICTIMS FUND

Virtually all criminal fines and all special assessments and bail bond forfeitures are deposited into the Crime Victims Fund, which is administered by the Office for Victims of Crime of the United States Department of Justice. Grants are made from the fund to the states in support of victims' assistance programs.

This pamphlet was prepared by the Financial Litigation Staff of the Executive Office for United States Attorneys for all federal defendants sentenced to pay a fine, assessment or restitution.

For additional copies of this pamphlet

(available in quantities of 100):

Department of Justice personnel -
Please submit DOJ-182 with stock
number 53-LOM-17 to:
Department of Justice Warehouse
3905-17 Pennbelt Place
Forestville, MD 20747-4735

United States Court personnel -
Please write to:
Printing & Distribution
8034-B Crydenway
Forestville, MD 20745

Appendix A.7

FILED

JAN 29, 93

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE: ANTHONY P. BROOKLIER, ESQ.) ADMITTED TO THE BAR OF THE) NINTH CIRCUIT: January 11, 1977	No. 93-80036 Central District California
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ANDRE JACKSON, Defendant-Appellant.	No. 89=50034 DC# CR-88-554 -LEW Central California
UNITED STATES OF AMERICA Plaintiff-Appellee, vs. LESTER CHARLES THOMPSON, Defendant-Appellant.	No. 90-50598 DC# CR-89-960 -AAH Central California
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. DEAN EDWARD BOWEN,	No. 91-50140 DC# CR-90-153 -LEW Central California ORDER

Defendant-Appellant.)
)
_____)

Before: REINHARDT, HALL and LEAVY, Circuit Judges

It has come to the court's attention that Anthony P. Brooklier, Esq., has apparently abandoned his clients in the above listed appeals. The court has received information, which if true, would appear to require that Anthony P. Brooklier, Esq. be sanctioned for abandoning his clients after accepting retainers. Mr. Brooklier's conduct in prosecuting these appeals appears to have caused delay, disruption, expense to the taxpayers, and may have violated the rules governing an attorney's duty in processing an appeal before this court.

Accordingly, within 21 days from the date of this order, Mr. Brooklier shall show cause in writing why he should not be sanctioned in the amount of $500 in each of the above - captioned cases for his failure to prosecute diligently these appeals. Mr. Brooklier shall also show cause in writing why he should not be suspended or disbarred from practice in this court for conduct unbecoming a member of the bar. Fed. R. App. P. 46 and advisory committee's note regarding sanctions; Ninth Cir. R. 46-2. Mr. Brooklier shall submit his response with one original and five copies.

In addition, the court finds it appropriate for Mr. Brooklier to make a personal appearance before this court. Accordingly, the Honorable Arthur L Alarcon will serve as the Special Master for the purpose of providing the court with findings regarding counsel's alleged failure to comply with the rules of the court, his conduct in these appeals, and his compliance with this order. On March 12, 1993 at 10:00 a.m. in Courtroom M on the Tenth Floor of the United States District Court, Central District of California, 312 North Spring Street in Los Angles, California, Anthony P. Brooklier, Esq., is ordered to show cause before the Honorable Arthur L. Alarcon why he should not be sanctioned and suspended or disbarred for the following conduct:

1. failing to respond to the court's April 17, 1992 order to show cause in United States v. Jackson, No. 89-50034: See Exhibits A, B, C, D;

2. failing to file the opening brief due October 23, 1992 and failing to respond to the court's December 11, 1992 order to show cause in United States v. Thompson, 90-50598; See Exhibits E, F, G;

3. failing to file the opening brief due January 27, 1992 in United States v. Bowen, 91-50140. See Exhibits H, I, J.

Mr. Brooklier shall have the right to be represented by counsel at this hearing.

Upon submission to the Special Master's findings and recommendations, the next regularly scheduled motions panel will

determine the appropriate disciplinary action. See Fed. R. App. P. 46(c).

Mr. Brooklier shall file his response in appeal No. 92-80036, the case opened in this disciplinary matter. Failure to respond and appear will result in the automatic imposition of monetary sanctions on Mr. Brooklier in the amount of $1,500.00 without further notice and Mr. Brooklier's immediate disbarment from practice in this court.

The Clerk shall serve a copy of this order with the attached exhibits by certified mail (return receipt requested) on Anthony Brooklier, Esq. at Marks & Brooklier, 8383 Wilshire Boulevard, Suite 750, Beverly Hills, California 90211.

The Clerk shall serve a copy of this order with the attached exhibits on the State Bar of California, 555 Franklin Street, San Francisco, California 94102.

Within 10 days of this order, the United States Attorney shall serve a copy of this order individually on the appellants at their current addresses and provide proof of such service to this court.

Appellant Thompson's motions to proceed in forma pauperis and for appointment of counsel in appeal no. 90-50598 are addressed by separate order.

Separate orders also have been issued in United States v. Jackson, 89-50034, and United States v. Bowen, 91-50140.

CR CAL 1/27/93

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, NO. 90-50598

Plaintiff-Appellee, DECLARATION OF SERVICE

v.

LESTER CHARLES THOMPSON,

Defendant-Appellant.

I, JUDITH MC FANN, declare:

That I am a citizen of the United States and a resident of Los Angeles County, California; that my business address is 312 North Spring Street, Los Angeles, California 90012; that I am over

the age of 18 years, and am not a party to the above-entitled action; that on February 10th, 1993, I deposited in the United States mails in the United States Courthouse, 312 North Spring Street, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of: PROOF OF SERVICE OF ORDER

Addressed to: Lester Charles Thompson
Reg. No. 92698-012
F.P.C.
P.O. Box 1000, MB-091
Boron, CA 93516

at is last known address, at which place there is a delivery service by United States mail.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: This 10th day of February 1993.

JUDITH MC FANN

Appendix A.8

News Articles From Los Angeles Times Depicting Counsel Brooklier's Continuing Conduct

METRO NEWS
TUESDAY, JULY 7, 1998

Lawyer Admits Not Paying Income Tax for 10 Years

High-profile criminal defense lawyer Anthony Brooklier has admitted that he willfully failed to pay federal income taxes for 10 years.

The delinquency is much longer than was indicated when the Beverly Hills attorney's tax problems surfaced last month.

Rather than stand trial, he agreed at that time to plead guilty to two misdemeanors stemming from his failure to pay taxes for 1993 and 1994.

Federal prosecutors on Monday released a copy of the plea agreement. It included an acknowledgment by Brooklier that he intentionally failed to pay taxes from 1985 through 1996.

He owes the U.S. government more than $401,000 for that period.

In return for his guilty plea, the government promised not to prosecute him for the other years.

Brooklier, 52, has yet to explain his reasons for not paying his taxes.

"My failure to file was a mistake, which I'm taking very seriously." he said in a statement after his tax problems surfaced. "I'm doing all I can to solve the problem."

Brooklier was in federal court Monday, entering a not guilty plea during his arraignment before a federal magistrate. He intends to change his plea to guilty when he appears at the next hearing before U.S. District Judge Christina Snyder, according to his defense lawyer, Donald Re.

Besides having to pay the back taxes and penalties, Brooklier faces up to two years in prison and a $100,000 fine.

The Internal Revenue Service contacted him in 1992 about his failure to file returns, according to the plea agreement. After that meeting, he filed returns for 1985 through 1988 and acknowledged owing the government $57,451 but he never paid the money.

He has not filed income tax returns since then, according to the plea agreement.

Brooklier gained fame in the 1970's when, only a few years out of law school, he defended his father, reputed Mafia boss Dominic Brooklier, against racketeering charges.

His father eventually died in prison, but Brooklier earned a reputation as a consummate litigator. He went on to represent criminal defendants ranging from accused drug dealers to allegedly corrupt politicians and law enforcement officers.

His most recent high-profile client was Heidi Fleiss, who was convicted in federal court on charges of failing to pay income taxes on her earnings from running a call girl service.

METRO NEWS
TUESDAY, JULY 28, 1998

Attorney Pleads Guilty to Not Filing Tax Returns

Veteran criminal defense attorney Anthony Brooklier pleaded guilty in Los Angeles federal court Monday to two misdemeanor counts of failing to file personal income tax returns.

Brooklier will be sentenced October 7 by U.S. District Judge Christina A. Snyder. Brooklier's clients have included Heidi Fleiss and his own late father, who was a convicted mobster.

Assistant U.S. Atty. Sally L. Meloch said the government intends to ask the judge to sentence the 52-year-old Beverly Hills lawyer to at least 15 months in custody.

During questioning by the judge, Brooklier acknowledged that he was also risking loss of his license to practice law by entering his guilty plea.

But his lawyers, Donald Re and David Chesnoff, said they hoped that would not occur. They told reporters outside the courtroom that Brooklier had received Testimonials from many attorneys, judges and even some law enforcement officers.

Brooklier's decision to plead guilty to two misdemeanors grew out of an agreement with prosecutors reached earlier this year.

Had the case gone to trial, he would have faced charges of failing to file returns or underreporting his income over a 10-year period.